STATE OF MICHIGAN

COURT OF APPEALS

CARL MONTAGUE and NANCY MONTAGUE, as husband and wife,

Plaintiffs-Appellants,

v

ST. MARY'S MEDICAL CENTER, P.C.;

Defendant,

and

GERALD R. SCHELL, M.D.; SAGINAW VALLEY NEUROSURGERY, P.C.; SURYARAO KURUMETRY, M.D.; CARO COMMUNITY HOSPITAL; and WAHEED AKBAR, M.D., Jointly and Severally,

Defendants-Appellees.

UNPUBLISHED
April 18, 1997

No. 190246
Saginaw Circuit Court
LC No. 94-005062 NH

Before: Taylor, P.J., and Gribbs, and R. D. Gotham,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of all defendants pursuant to MCR 2.116(C)(7) and (8). Plaintiff Carl Montague was injured when he fell from a ladder. Plaintiff sought medical treatment from defendants. Plaintiffs filed this malpractice action when they allegedly discovered that defendants failed to diagnose and treat Carl Montague's degenerative hip condition. Plaintiff Nancy Montague's claims were derivative of her husband's claims. The trial court found that plaintiffs did not file their complaint within the applicable statute of limitations,

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* Circuit judge, sitting on the Court of Appeals by assignment.

and that the complaint failed to outline a cause of action against defendant Dr. Akbar. We affirm in part, reverse in part, and remand for further proceedings.

Initially, plaintiff argues that he filed his complaint within the six-month discovery exception to the medical malpractice statute of limitations. We agree. In reviewing a trial court's grant of summary disposition pursuant to MCR 2.116(C)(7), this Court is required to accept the plaintiff's well-pled allegations as true and construe them in favor of the plaintiff. *Michigan Millers Mutual Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367, 370; 494 NW2d 1 (1992).

An outline of the facts is necessary to the resolution of plaintiff's issues. Plaintiff filed his complaint on November 10, 1994. Plaintiff alleged that throughout the time of his treatment with defendants, defendants told him that the pain in his lower back, right hip and leg were from back problems. Defendant Dr. Kurumetry performed a lumbar myelogram on plaintiff on July 15, 1992. Kurumetry referred plaintiff to defendant Dr. Schell, who informed plaintiff that the myelogram showed a central disc herniation. Schell recommended physical therapy, and performed a hemilaminectomy on August 13, 1992. Plaintiff continued to complain of pain and difficulty walking, so Schell referred him to defendant Dr. Akbar. Akbar continued plaintiff's rehabilitative therapy, and ultimately performed a second back surgery on January 25, 1994, in which he removed the L4-5 disc, and performed a decompressive lumbar laminectomy and lateral fusion. Plaintiff continued to complain of pain in his right hip, so Schell took an x-ray of that area on February 24, 1994. The x-ray indicated that plaintiff was suffering from either aseptic necrosis or septic arthritis. Plaintiff saw Akbar on March 31, 1994, due to continuing pain in his right hip. Plaintiff underwent a total hip replacement on June 29, 1994.

Plaintiff argues that he could not have discovered that he had a hip problem, and hence a cause of action, until May 16, 1994, because Dr. Akbar did not reveal the results of the x-ray to him until then. The general two-year limitations period for medical malpractice claims is subject to a six-month discovery rule exception. MCL 600.5838a(2); MSA 27A.5838a(2), *Shawl v Dhital*, 209 Mich App 321, 324; 529 NW2d 661 (1995). A medical malpractice claim may be commenced after the expiration of the two-year period if it is filed within six months after the plaintiff discovers or should have discovered a possible cause of action. *Id; Moll v Abbott Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993). The trial court found that plaintiff should have discovered a possible claim as of January 25, 1994, the date of plaintiff's second surgery. We disagree with the trial court.

A plaintiff is deemed to have discovered a claim if he has discovered a possible cause of action; he need not know with certainty that malpractice has occurred. *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). Plaintiff must know of the act or omission of the defendant, and must have reason to believe that the medical treatment was improper or was performed in an improper manner. *Kermizian v Sumcad*, 188 Mich App 690, 694; 470 NW2d 500 (1991). In this case, we do not believe the mere fact of plaintiff's continued pain after the first surgery, and the necessity for a second surgery, were sufficient to place plaintiff on notice that something was amiss with the first surgery. Plaintiff's doctors had advised him that he was suffering from a severe back problem. Because plaintiff had fallen from a ladder, it was not unreasonable for him to accept his doctors' diagnosis. It is common knowledge that back problems can cause chronic pain and that they are often

difficult to treat. Indeed, it would be rare for a physician to guarantee that removal of an injured disc would make a patient pain free. In light of plaintiff's injury and the nature of his complaint, it was not unreasonable for plaintiff to rely on his doctors advice until he became aware of the results of his x-rays.

Plaintiff argues next that his complaint was sufficiently detailed to support his claim against Dr. Akbar. We disagree. A motion pursuant to MCR 2.116(C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

The crucial question in determining the sufficiency of a complaint is whether the complaint is specific enough to provide the defendant with notice of the allegations against which he must defend. *Porter v Henry Ford Hospital*, 181 Mich App 706, 709-710; 450 NW2d 37 (1989). Our review of plaintiff's complaint and first amended complaint reveals that the only acts of negligence alleged were treatments occurring in 1992. It is undisputed that Dr. Akbar did not begin treating plaintiff until February 1993. Plaintiff's complaints listed several acts of alleged negligence, but failed to indicate which defendant was responsible for which acts of negligence, or even if all defendants were allegedly guilty of all alleged acts. We agree with the trial court that plaintiff's complaints was not sufficiently specific to reasonably inform Dr. Akbar of the claims against which he was required to defend.

Finally, plaintiff contends that the trial court erred in denying his motion for leave to amend his complaint. We agree. Leave to amend shall be freely given when justice so requires. MCR 2.118(A)(2). A motion to amend a complaint should generally be denied only where there is undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, or undue prejudice to the opposite party by allowance of the amendment. *Gardner v Stodgel*, 175 Mich App 241, 248; 437 NW2d 276 (1989). Although the record reveals that plaintiff exhibited delay in bringing his motion for leave to amend his complaint, less severe sanctions were available to the trial court. This matter is remanded to give plaintiff the opportunity to cure the deficiencies in his complaint.

The trial court's order granting summary disposition in favor of defendants Dr. Schell, Dr. Kurumetry, Saginaw Valley Neurosurgery and Caro Community Hospital, is reversed. The trial court's order granting summary disposition to Dr. Akbar is affirmed; however, the dismissal is without prejudice and this matter is remanded to allow plaintiff to amend his complaint.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Roy D. Gotham